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No. 08-1569

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE, ET AL.,

Petitioners,

— v —

WEST CARIBBEAN AIRLINES, S.A., a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

All 160 people aboard WCA Flight 708 died when it crashed, inextricably linking all resultant claims through a common set of facts. Applying the Multiparty Multiforum Trial Jurisdiction Act of 2002 (the "MMTJA" codified 28 U.S.C. §1369) to these facts should have given *all* of the victims equal access to relief, but it did not. The District Court, which stated that it was at all times exercising 28 U.S.C. §1369 jurisdiction, granted the Passengers and Crew disparate relief when it divided them into two separate proceedings, with the Colombian Crew defeating all *forum non conveniens* ["FNC"] challenges and ultimately settling their case in the District Court, but only after the French Passengers were dismissed to Martinique for FNC. This Petition is the first opportunity for this Court to address the MMTJA, while it also addresses whether the Petitioners should have been granted Rule 60(b) equitable relief and the disparate treatment Petitioners received. Petitioners seek the due process that should have been afforded to them under the MMTJA.

The MMTJA grants all claimants who could not bring an original proceeding the "right" to intervene their claims, regardless of the legal theories involved, into any established §1369 proceeding—even if they could not establish one themselves. 28 U.S.C. §1369(d). So, once the Crew of Flight 708 established a 28 U.S.C. §1369 proceeding in the District Court, all other victims with claims arising from the same accident should have been granted the right to intervene into that proceeding by operation of 28 U.S.C. §1369(d). As victims of the same accident as the Crew, Peti-

tioner Passengers were entitled to intervene under §1369(d), but they needed relief from the prior FNC dismissal of their Montreal Convention claims before the Passengers could join those claims into the Crew Members' proceeding. Despite the Passengers' request for Rule 60(b)(5) and (6) Relief from the FNC dismissal based on *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965), *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), and the commanding language of the MMTJA, and despite the fact that the prior dismissal was a non-merits dismissal, the Courts below denied Petitioners any relief thereby preventing any intervention into the Crew Members' established MMTJA proceeding.

Rule 42 of the Federal Rules of Civil Procedure favors adjudicating all factually related claims in one proceeding. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). The MMTJA furthered this general principle by requiring Courts to aggregate all pending claims resulting from a single, qualifying disaster into one proceeding through the Multidistrict Lititation process and to grant the mandatory right of intervention to each claimant who could not otherwise bring an original action. 28 U.S.C. §1369(d). Under the circumstances presented, and under both Rule 60(b) and the MMTJA, the failure to grant Rule 60(b) relief so that the Petitioners could subsequently intervene into the MMTJA proceeding established by the Crew conflicted with *Gondeck*, *Pierce*, and the unambiguous language of the MMTJA. Petitioners, whose 102 innocent relatives died in this single aviation disaster, deserved the same justice as the Crew. Rather

than address the legal issues and the plain language of the MMTJA, Respondents argued avoidance issues, took wide liberties with facts and time frames, and tried to rewrite the clear language of the MMTJA.

I.

THE SETTLEMENT OF THE CREW CASE IN THE DISTRICT COURT SUPPORTS THE GRANT OF RELIEF

The settlement and subsequent dismissal of the Crew case neither adversely impacted the viability of this Petition nor rendered it moot. While the Crew's secretive settlement attempted to prevent and moot further review of this case for Petitioners, their actions only highlighted the irreconcilable conflict between the Circuit Court's decision, the MMTJA, *Gondeck*, and *Pierce*. Contrary to Respondents' mootness claim, the discrepancy between the different relief which the District Court afforded the Passengers and Crew still remains actionable. The settlement did nothing to equalize the disparate relief afforded the Passengers and Crew. The Crew's settlement further exemplifies how the rulings below created different rules of law and inconsistent relief for the Passengers and the Crew. Ultimately, and based on established law, the settlement of the Crew case did not resolve or moot the issues of whether Petitioners were wrongfully denied Rule 60(b)(5) and (6) relief from the FNC dismissal of their claims, whether the Courts below improperly considered the MMTJA as "simply" a jurisdictional Act, or whether Petitioners were entitled to relief in the

U.S. District Court commensurate with that available to the Crew pursuant to *Gondeck* and *Pierce*.

While Respondents have claimed that no viable case remains into which Petitioners could intervene, neither they nor the District Court addressed the written objection that Petitioners filed in the Crew case—which contested any settlement which failed to reserve jurisdiction or protect Petitioners' interests.[1] (Opp. 13) The District Court dismissed the Crew case as a result of the settlement without reserving jurisdiction as to Petitioners' pending appeal. Petitioners have appealed that dismissal to the Eleventh Circuit Court of Appeals, and pursuant to the authority of *Purcell v. BankAtlantic*, 85 F.3d 1508, fn. 3 (11th Cir. 1996), and *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997), the viability of this appeal continues.[2] Despite Respondents' contention that "there is no case in which Petitioners could intervene", the Court in both *Purcell* and *Mausolf* previously disposed of the same "mootness" arguments made herein by reasoning that parties cannot be deprived of their independently viable claims under circumstances almost identical to those presented herein. If the Courts below erred and if Petitioners were improperly denied Rule

[1] The District Court's Order Denying Intervention [07-22015 DE 413] reasoned that the Petitioners' interests were "adequately protected . . . by the Crew Member Plaintiffs and their experienced counsel", although nobody protected Petitioners' interest in the settlement nor in the event of a successful appeal.

[2] *Rapte v. The Boeing Company, et al.*, Eleventh Circuit Court of Appeals Case No.: 10-13566-E.

60(b)(5) or (6) Relief, then Petitioners still remain entitled to relief in the District Court to pursue their claims. In sum, the settlement of the Crew case did not extinguish the pending controversy nor did it render this Petition moot.

II.

THE MANDATORY LANGUAGE OF THE MMTJA AND THE LEGISLATIVE INTENT BEHIND THE MMTJA WERE COMPLETELY IGNORED

The Courts below erred by relegating the language of the MMTJA from mandatory undertakings to discretionary acts.[4] Ultimately, this gave the Crew inequitable access to better and more complete procedural and substantive relief than Petitioners. The very purpose of the MMTJA was to prevent same. Respondents either avoided the plain and clear language of the MMTJA or they took positions antagonistic to both the MMTJA and the clear Congressional intent behind it, to support the illogical rulings made by the Courts

[4] The District Court issued what was tantamount to a *sua sponte* Order which denied Petitioners any relief before a response to Petitioners' Motion for Rule 60(b) Relief was filed. The District Court did not consider Petitioners' Motion untimely, but instead denied it based on extraneous information not contained in the record, which it buttressed with unfounded speculation about Petitioners' ulterior motives and best interests. Ultimately, the District Court relegated the MMTJA from being a sweeping Congressional reform intended to consolidate all claims resulting from a catastrophic single accident through the determination of liability to "simply" a jurisdictional act. [App. 5a.]

below. Respondents' obfuscation of the MMTJA and its legislative history is telling.

Congress specifically intended for the MMTJA to consolidate *all cases and claims* arising from a single catastrophic accident into one proceeding. H.R. 107-14 at 4-6 (2001) ("*Current efforts to consolidate all State and Federal cases related to a common disaster are incomplete* because current Federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation.") The Courts below should have construed the MMTJA in a manner which favored consolidation of all Flight 708 claims into one master MDL proceeding, but they did not. *See e.g., Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000) (Courts "must give effect to the unambiguously expressed intent of Congress") (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). By citing to neither the MMTJA nor to its legislative history, Respondents tacitly conceded these errors.

A. What part of "shall promptly notify" was discretionary?

All of the Flight 708 cases invoked the District Court's 28 U.S.C. §1369 jurisdiction (App. 9a), which meant that the District Court erred at the outset of this litigation when it disregarded 28 U.S.C. §1369(e) ("A district court in which an action under this section is pending *shall promptly notify the judicial panel on multidistrict litigation* of the pendency of the action"). Respondents have argued that "no such notice was

required" by citing to the permissive MDL mechanism contained in 28 U.S.C. §1407 rather than to the mandatory 28 U.S.C. §1369(e). (Opp. p. 25.) Respondents then relied exclusively on the general function of the JPMDL instead of the clear language of the MMTJA or its procedural history, and without any regard for what would have occurred after the JPMDL assembled a single MDL proceeding for Flight 708 victims. Respondents ignored the mandatory term "shall" in 28 U.S.C. §1369(e),[4] which removed any discretion regarding the District Court's duty to notify the JPMDL, and instead argued that such notification was permissive based on 28 U.S.C. §1407(a) (". . . *such actions may be transferred* to any district for coordinated or consolidated pretrial proceedings"). However, the enactment of a specific provision in 28 U.S.C. §1369 removed any discretion given to litigants under 28 U.S.C. §1407 to request an MDL proceeding by imposing a mandatory duty upon District Court Judges to "promptly notify" the Judicial Panel on MDL of the pendency a §1369 proceeding. *Manual for Complex Lit.*, §20.131 (4th ed. 2009). Respondents' reliance on 28 U.S.C. §1407(a) was wholly misplaced and cannot supplant the unambiguous mandatory provisions of the MMTJA.

Had the District Court "promptly" notified the JPMDL, a single MDL judge would have addressed all pre-trial issues and adjudicated issues of common liability uniformly in this case. H.R. 107-14 at 2. The single MDL Judge presiding

[4] *See DirecTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) (recognizing difference between use of mandatory "shall" and permissive "may").

over the Flight 708 MDL proceeding also would have adjudicated the issue of FNC as a threshold matter concerning the proceeding *as a whole*, for all Flight 708 victims, rather than separately for the Passengers and the Crew. (*But see* Opp. 25.) Accordingly, the District Court's initial error was not harmless. Once the District Court omitted the first mandatory step towards aggregating all Flight 708 claims into one proceeding, it injected the remainder of the proceeding with error.

B. How did the District Court create separate proceedings?

Before any FNC challenge, and only weeks after the first of the Crew cases was filed, Defendant, Newvac Corporation, urged the District Court to segregate the claims asserted on behalf of the Passengers and Crew into different consolidated proceedings based upon the types of claims advanced. [07-22018 DE 26.] In contrast, the Crew advocated for the creation of one all-inclusive proceeding; pointing to the common issues of liability and causation. [07-22018 DE 27.] Despite the Crew's arguments and despite the MMTJA, the District Court established a separate proceeding for the Crew on August 30, 2007 based on the type of claims asserted. [07-22015 DE 23.] The distinctions drawn by the District Court were not material then, nor were they material to Petitioner's Motion for Rule 60(b) Relief. Although one of the critical purposes of the MMTJA was to consolidate *all claims* into one §1369 proceeding without regard for the type of claim to be joined, the District Court repeatedly utilized these immaterial distinctions in the causes of action brought by the Passengers and Crew to deny Petitioners equal

treatment. The MMTJA clearly grants anyone with a "claim" arising from the accident the right to intervene without regard for the type of claim raised.

The Order which created the separately consolidated Crew case imposed a daunting impediment to any subsequent attempt by Petitioners to intervene or join it. As an interlocutory order, neither was it subject to immediate appellate scrutiny. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43-48 (1995). Respondents addressed none of these procedural nuances.

C. How could "shall be permitted to intervene" not confer a *right* of intervention?

On November 9, 2007, just over two months after the District Court refused to consolidate the Passenger and Crew cases, it dismissed Petitioners' Montreal Convention claims for FNC. [App. 4, App. 5.] That dismissal, a non-merits dismissal, prevented Petitioners from bringing their claims in the District Court "as an original matter". 28 U.S.C. §1369(d). Petitioners appealed that dismissal to the Eleventh Circuit Court of Appeals, but the Circuit Court did not render its decision on whether FNC applied to the Montreal Convention until October 8, 2009. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *reh'g denied* (Dec. 30, 2009.)[5]

[5] During the intervening two years, the parties to the Crew case conducted discovery and litigated only the issue of FNC.

In the interim, the District Court denied the first of *two* FNC challenges to the Crew case on September 30, 2008. It was not until May 14, 2009 that the District Court disposed of the second and final FNC challenge of the Crew case which established the requisite jurisdiction for a §1369 proceeding for the claims of all of the victims of Flight 708. [App. 3.] It was this dramatic change in circumstances which occurred on May 13, 2009 which prompted Petitioners to pursue Rule 60(b)(5) and (6) relief so that they could intervene into the established §1369 proceeding.[6] Pursuant to the District Court's ancillary jurisdiction over all other Flight 708 claims, there could be no further FNC challenges regardless of who sought to join the Crew case by way of intervention or consolidation. *Sweeney v. Athens Reg. Med. Cntr.*, 917 F.2d 1560 (11th Cir. 1990); and *N.C.O. Assn. of the U.S. v. Army Times Pub. Co.*, 637 F.2d 372, 373 (5th Cir.1981), modified on other grounds and reinstated, 650 F.2d 83 (5th Cir.1981).

[6] 28 U.S.C § 1369(d) allows intervention of all others with 'claims' arising from the same accident. As Petitioners' prior FNC dismissed was a non-merits dismissal, they moved to intervene into the MMTJA proceeding established by the District Court when it denied the Crew's second FNC challenge. Ultimately it was the District Court's own ruling that opened the door to the MMTJA proceeding and there was absolutely nothing 'subversive' about Petitioners' moving to intervene as Congress intended.

III.

PETITIONERS DID NOT WAIVE THEIR TIMELY-PRESENTED MMTJA ARGUMENTS

Respondents employed a two-part "parlor trick" to contend that Petitioners waived their MMTJA arguments, the first part of which attempts to raise confusion about the language and significance of the MMTJA, with the second component making it appear as though Petitioners should have raised the MMTJA issue earlier. Behind this "parlor trick" is Newvac Corporation, the common defendant in both the Passenger and Crew cases who orchestrated the different procedural paths taken by the Passengers and Crew.

A. Part One: Confusion.

The MMTJA conferred original jurisdiction on the District Court by lowering the threshold minimum diversity requirements, and the District Court admittedly exercised that jurisdiction when presiding over all Flight 708 proceedings. 28 U.S.C. §1369(a); [App. 5a.] Respondents, however, confused "original" jurisdiction with "anchor" or "piggy-back" jurisdiction. The Fifth Circuit Court of Appeals discussed this distinction in the context of MMTJA when it explained that "piggy-back" or ancillary jurisdiction confers victims who were otherwise unable to avail themselves of a remedy in a District Court with the ability to rely on the "piggy-backing jurisdiction on the district court's original jurisdiction under §1369(a)". *Wallace v. Louisiana Citizens Prop. Ins.*, 444 F.3d 697, 702 (5th Cir. 2006). Thus, Petitioners should have

been entitled to "piggy-back" their claims onto the jurisdiction granted by the District Court to the Crew, but the District Court erroneously denied Petitioners the ability to utilize the "piggy-back" ancillary jurisdiction conferred on them. Since Petitioners could not have attempted to join the Crew case sooner for those reasons discussed above, and since any attempt at intervention before May 13, 2009 would have been premature, Petitioners' efforts were by all measures timely. *See Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994).

B. Part Two: The Illusion.

Petitioners served Appellants' Consolidated Initial Brief in the Eleventh Circuit Court of Appeals in the *Pierre-Louis* matter on March 24, 2008, *before* the District Court issued either of its FNC rulings in the Crew case, and when they could not predict how the District Court would later treat any FNC challenge to the Crew's claims. Respondents nonetheless made it seem as though Petitioners should have included arguments predicated on 28 U.S.C. §1369 in the appeal of the FNC Order of Dismissal (which resulted in the *Pierre-Louis* decision). The deception in that argument is glaring, as Petitioners had no MMTJA arguments to make until May 13, 2009, when the District Court first established the §1369 proceeding for victims of the Flight 708 disaster. In fact, the Briefs for that FNC appeal were already filed long before the Crew even established the §1369 proceeding on May 13, 2009. Petitioners were not able to avail themselves of 28 U.S.C. §1369(d) and seek to "piggy-back" their claims on the jurisdiction established by the Crew until *after*

the Crew established "anchor" jurisdiction. As such, Petitioners were timely and nothing was waived. [App. 3.] To date, no Court has considered Petitioners' efforts untimely if measured from May 13, 2009. Ultimately, Respondents' efforts at suggesting that Petitioners should have been clairvoyant and known what or how the District Court would later dispose of the FNC challenge to the Crew case, and at using that as a basis for their waiver and estoppel arguments, again demonstrates the lack of validity in Respondents' arguments.

CONCLUSION

Despite Respondents' contentions, there are conflicts that are ripe for adjudication, not only between Appellate Courts, but with prior decisions of this Court. Respondents ignored significant procedural events for which they were responsible, and they gave no credence and no ink to the specific language of, or the Congressional intent behind the MMTJA. For the foregoing reasons, the Petition for Writ of Certorari should be granted.

Respectfully submitted,

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